TAN CHONG KIAT

v.

KWAN AH SOH & ANOR

HIGH COURT MALAYA, SEREMBAN
MOHD NOOR ABDULLAH J
[CIVIL SUIT NO: 22-29-96]
20 FEBRUARY 1998

TRUSTS: *Resulting trust - Matrimonial property - Lottery prize money - Lottery ticket purchased by husband - Whether purchased from matrimonial funds - Whether resulting trust accrued to wife - Whether money to be equally shared*

FAMILY LAW: *Matrimonial property - Lottery ticket - Prize money - Whether lottery ticket purchased by husband - Whether bought with money from joint funds - Whether husband holding prize money in trust of wives - Whether wives entitled to equal share thereof*

The plaintiff was married to the 1st and 2nd defendants. He ran a petrol station and a mini market beside the petrol station ('Kim and Company') with the help of the 1st defendant. He was also the sub-agent of the Sabah Sweepstakes lottery tickets. At a draw of the tickets held at Sandakan, one of the unsold tickets held by the plaintiff won the 1st prize of RM2 million. The prize money was deposited in a fixed deposit account and the interest accrued from it was credited into a savings account. Both the accounts were operated by the plaintiff, the 1st defendant and the 2nd defendant, and the mode of operation was any two of three signatures, none of which was mandatory. After a few withdrawals, the plaintiff was unable to obtain the signatures of either the 1st or the 2nd defendant for further withdrawals, and in consequence filed an application for a declaration that the prize money solely belonged to him and that the defendants were holding the money in trust for him. The 1st defendant counter claimed that the prize money belonged to her wholly as she had paid for the lottery tickets with her own money and that the plaintiff was holding the money in trust for her. Alternatively, the defendants argued that there was a gift of 1/3 share to each of them and that they were entitled to such proportion of the money.

Held:

[1] The cash sale receipt for the lottery tickets was issued in the name of the plaintiff and not in the name of the first defendant. Therefore either the plaintiff himself bought the tickets or the first defendant paid for the tickets on his behalf. The reasonable conclusion under the circumstances was that the plaintiff bought the tickets.

[2] Although the plaintiff had deposited the prize money in the joint accounts of himself and the defendants without any intimation that the defendants hold the money in trust for the plaintiff, nevertheless the beneficial interest in the money results or reverts to the plaintiff who is the purchaser of the lottery tickets. A resulting trust does not apply to the first defendant as she is not the purchaser of the tickets.

[3] The plaintiff had not made any gifts of the prize money to the defendants. It follows that the prize money belonged to the plaintiff and he was entitled to deal with it as he pleased. And it follows further that the defendants were holding the money in trust for the plaintiff. The defendants' counterclaim, in the circumstances, must necessarily fail.

[4] Lottery wins achieved in the course of a marriage or a period of cohabitation are to be regarded as joint contribution by the parties rather than a contribution by that party who actually purchased the ticket. In this case, the lottery tickets were purchased by the plaintiff from the funds of Kim and company to which the first defendant contributed her time and energy, financially and other domestic activities alongside the plaintiff's contribution. That being so, the prize money should be shared equally between the plaintiff and the first defendant.

[Order accordingly.]

Case(s) referred to:

Anastasio [1987] FLC 91-93 ***(refd)***

Luhat Wan v. The Social and Welfare Services Lotteries Board & Ors [1990] 1 CLJ 472 ***(refd)***

Rebecca Mariam Zyk [1995] FUC 92-644 ***(refd)***

Van Rassel v. Kroon [1952-1953] 87 CLR 298 ***(refd)***

Voulis v. Kozary & Anor [1994] 180 CLR 177 ***(refd)***

Zyk v. Zyk [1995] FLC 29-644 ***(refd)***

Other source(s) referred to:

Snell's Principles of Equity, 1982 & 1998, 28th edn

Halbury's Laws of England, 4th edn, vol 48 & 315

For the plaintiff - Gurdit Singh; M/s R. Shan & Assoc
For the defendants - CT Lee; M/s Fernandez & Co

Reported by Michele Saw & WA Sharif

JUDGMENT

Mohd Noor Abdullah J:

The plaintiff is an old man of 82 years of age and is married to the 1st defendant who is 20 years younger. When he was 54 years old he took a second wife. He has 5 daughters with the first all of whom are married and 2 daughters with the second, the younger of whom is still studying at a college. The plaintiff operates a petrol station and a mini market beside it. The 1st defendant and her daughter assist the plaintiff in both operations under the business name of Kim and company. The 2nd wife and her daughters do not participate in the business. The plaintiff's known source of income is from the business. As a supplement to his income he is also a sub-agent of Sabah Sweepstakes lottery tickets which he buys from Golden Enterprise, the authorised agent, and sells or otherwise keeps any unsold tickets.

Sabah Sweepstakes lottery ticket No. 2177908 struck the 1st prize of RM2,000,000 at a draw held at Sandakan on 25 June 1989. The plaintiff claims he bought the ticket, whereas the 1st defendant claims she bought the ticket and the 2nd defendant claims she has a share in the prize money. The RM2 million windfall is deposited in a Fixed Deposit Account and the interest accrued from it is credited in a Savings Account. Both the accounts are operated by the plaintiff, the 1st defendant and the 2nd defendant and the mode of operation is "TWO of THREE" and none of them is mandatory. After a few withdrawals from the Savings Account, the plaintiff can no longer obtain the co-signature of the 1st defendant or the 2nd defendant to withdraw any more money. They refuse to co-operate because the plaintiff "spent all his money for the other woman" so said the 1st wife. He alone cannot withdraw; they choose not to withdraw either but he needs the money more than them, hence this action.

The plaintiff applies for a declaration that the price money belongs to him solely and absolutely and that the defendants are holding the money in trust for him. Conversely the 1st defendant counterclaims that the price money belongs to her wholly and absolutely and that the plaintiff is holding the money in trust for her. Alternatively the defendants counter-claim that the plaintiff has made a gift of 1/3 share each to the defendants and they are entitled to such proportion of the money.

The plaintiff establishes the following evidence to support his claim that he bought the tickets.

1) The cash sale acknowledgement receipt (exh. P1) for the sale of 100 lottery tickets bearing No. 2177900 to 2177999 for RM200 at RM2 per ticket was issued to and in the name of Tan Chong Kiat, the plaintiff.

2) The price winning commission of RM100,000 was paid to the plaintiff by means of Lee Wah Bank cheque No. 349122 which the plaintiff wrote in the cash sale receipt. He also wrote the 1st price winning number 2177908 on the receipt.

3) The plaintiff is a sub-agent who has bought lottery tickets eight times from Golden Enterprise, the authorised agent and the winning ticket is the 6th time. A sub-agent earns a commission and the agent does not sell to any other person except to his sub-agent and that is why the salesman came thrice to sell the tickets at 9.30am, 11am and 12.30pm insisting to see the plaintiff. It is observed that all the cash sale receipts marked as exhs. D5, D6A-B, D11A-E and P16 are issued in the name of Tan Chong Kiat, the plaintiff.

The 1st defendant produces the following evidence to support her claim that she bought the tickets.

1) She bought the tickets with her own money taken out from her purse which was kept in the kitchen and was short of RM50 which she obtained from her daughter Tan Yap Seng. The latter corroborated the 1st defendant's evidence, not only that the 1st defendant used her own money plus her RM50 but that she witnessed the sale transaction.

2) The cash sale receipt was signed by her daughter Tan Yap Seng at the request of the 1st defendant who bought the tickets and paid cash for them. She signed above the name of Tan Chong Kiat, the plaintiff.

3) The winning ticket is in her name which she wrote on the reverse side of the ticket after discovering that the plaintiff had written his name on the reverse side, the night after the result was announced and the ticket declared the winner.

4) The price money was deposited in their joint accounts in both the fixed Deposit Account and the Savings Account. This was done at the instigation of the plaintiff but it was the 1st defendant who kept custody of all the credit notes and the renewal advice (exh. P4A-V) and for some time the savings account book.

It is worthy of mention that the answer to the key question, who bought the tickets, is with Tan Teng Yew the salesman from whom the 100 tickets were bought. It appears that he has eluded the approach by both the plaintiff and the 1st defendant or their agents for reason only he knows best, inspired perhaps by the desire to stay away from family dispute or more particularly from the ungrateful greedy couple in their twilight years.

It is observed that the evidence established by the plaintiff support his claim that it was he who bought the tickets whereas the evidence produced by the 1st defendant, if true, only tend to show not that she bought the tickets but that she has an interest in the price money. I shall now elaborate. The fact that the cash sale receipt was issued in the name of the plaintiff coupled by a further fact that the price winning commission of RM100,000 was paid to the plaintiff constitute cogent and overwhelming evidence that the plaintiff bought the tickets. The defendant's evidence cannot controvert such evidence. When a purchaser buys a thing, goods or chattel and an acknowledgement receipt is issued, it is issued to the purchaser. He could either be the person present who paid the money or he could be the person for whom and on whose behalf the person present paid the money. The receipt may be issued either in the name of the person who paid the money or in the name of his principal. In this case the cash sale receipt was issued in the name of Tan Chong Kiat and not Kwan Ah Soh. Therefore either Tan Chong Kiat himself bought the tickets or Kwan Ah Soh paid for the tickets on his behalf. In my opinion the reasonable conclusion under the circumstances is that the plaintiff bought the tickets. The daughter's evidence that her mother asked her to sign the receipt for nothing is unacceptable. In my opinion the person in whose name any sale receipt is issued for the purchase of any movable or immovable property in the absence of any reasonable explanation to the contrary is the purchaser of the property. I am unable to find support nor am I referred to any decision of our courts in this country for this proposition. The decision of Dato Lim Beng Choon J. in *Daniel s/o D. William v. Luhat Wan and 3 Ors and Luhat Wan v. The Social and Welfare Services Lotteries Board and 2 Ors* [1990] 1 CLJ 472 is not helpful as it decides on the person who has the better right to the property in the winning lottery ticket, the purchaser or the finder at a petrol station at whose feet the lottery ticket was blown. The learned counsel for the plaintiff referred to an Australian High Court case of *Van Rassel v. Kroon* [1952-1953] 87 CLR 298 where Dixon CJ held: "The person in whose name a lottery ticket issues obtains the legal title to what is a chose in action and in addition, if he is the applicant for the ticket he obtains the custody of the ticket and is in a position to exercise whatever rights the ticket confers and to deal with it as he chooses." In that case Kroon applied for a declaration that Van Rassel held lottery ticket No. 95518 and all rights attaching thereto and all money paid to him in respect thereof as trustee for himself and the

plaintiff in equal shares. The basis for the claim was an arrangement made between the plaintiff and the defendant that they would join in purchasing a ticket on a special lottery as distinguished from a ticket in an ordinary lottery. Kroon had handed to Van Rassel sufficient money to cover his half share. The winning ticket was purchased and the question is whether as the result of the arrangement Van Rassel held it not for himself alone but for himself and Kroon as co-owners in equal shares. Richardson J declared that the said ticket No. 95518 was held by Van Rassel in trust for himself and Kroon in equal shares and he ordered payment to Kroon of one half of the moneys payable in respect of the ticket. On appeal to the High Court of Australia the decision of Richardson J was reversed and the suit dismissed with cost. The learned Chief Justice concluded that the whole case comes down to the simple position that Van Rassel has shown that what he bought on account of himself and Kroon was the ticket No. 52766 notwithstanding that this was not a lottery of the agreed description and that he bought the winning ticket No. 95518 on his own account and identified it as his own.

In *Voulis v. Kozary and Another* [1994] 180 CLR 177, on appeal to the High Court of Australia Jacobs J held that the legal title to a lottery ticket is vested in him or those in whose names the ticket issues.

As I have stated earlier the evidence produced by the defendants, if true, would not support her claim that she bought the tickets. She wrote her name on the reverse side of the winning ticket only after she discovered that the plaintiff had written his name on it. The plaintiff who is earlier in time to write his name has a better claim that he purchased the ticket, again it was agreed by the plaintiff and the 1st defendant, immaterial whether the idea was mooted by either of them or the bank officer, that the two accounts are jointly operated by them. This arrangement cannot substantiate that the 1st defendant bought the tickets. Nor can the fact that the 1st defendant kept the credit notes and renewal advice prove that she bought the tickets. They were with the plaintiff until she took them away for safe keeping.

Having considered the whole evidence before me including an observation of the manner, attitude and demeanour of both the parties and giving due allowance to their infirmity and the complications of a triangular relationship of husband, wife and second wife, and having perused all the documentary evidence particularly the cash sale receipt, I conclude that the lottery tickets including the winning ticket were purchased by the plaintiff.

Resulting Trust

Snell's Principles of Equity (28th edn) 1982 p 98 states: "The clear result of all the cases, without a single exception is that the trust of a legal state, whether freehold, copyhold, or leasehold; whether taken in the names of the

purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of common law that where a feoffment is made without consideration the use results to the feoffer. The doctrine applies to pure personality as well as land." (A feoffment is the transfer of freehold land, in ancient times, by word of mouth and livery of seisin ie, by the delivery to the transferee of corporal possession of the land or tenement: *Jowitt's Dictionary of English Law*).

A resulting trust is a trust arising by operation of law (1) where an intention to put property into trust is sufficiently expressed or indicated but the actual trust either is not declared in whole or in part or fails in whole or in part; or (2) where property is purchased in the name or placed in the possession of a person ostensibly for his own use but really in order to effect a particular purpose which fails; or (3) where the property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended. In all these cases the beneficial interest in the property, so far as not applicable to any sufficiently expressed or indicated beneficiary or object, results or reverts to the disposer or purchaser of the property or, in the case of his previous death, to his representatives: *Halbury's Laws of England* 4th edn. vol. 48 p 315. In this case I have concluded that it is the plaintiff who purchased the tickets and although the plaintiff had deposited the price money in their joint accounts without any intimation that they hold the money in trust for the plaintiff, nevertheless the beneficial interest in the money results or reverts to the plaintiff who is the purchaser of the lottery ticket. A resulting trust does not apply to the 1st defendant as she is not the purchaser of the tickets.

A Gift Or Donation

A gift *inter vivos* may be defined shortly as the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true owner in possession to another person with the full intention that the thing shall not return to the donor. It has also been said that a gift is a voluntary transfer of property to another person without consideration. A gift appears to be effective when the donor intends to make it a gift and the recipient takes the thing given and keeps it, knowing that he has done so. In this case the 2nd defendant was made a co-signatory to both the accounts for administrative expediency in case the plaintiff and the 1st defendant became unco-operative or are otherwise disagreeable. The plaintiff did not intend to

donate 1/3 share of the price money to the 2nd defendant. When the money was initially withdrawn a number of times from the savings account, the plaintiff did not give nor did the 2nd defendant receive 1/3 share of the amounts withdrawn. The 1st defendant was not given nor did she receive 1/3 share of the amounts withdrawn. She received more than 1/3 share. The money belongs to the plaintiff and he is entitled to deal with it as he pleases. He can give to the 1st defendant any amount as he pleases but he did not donate nor intend to give 1/3 share of the money to the 1st defendant. The 1st defendant is not entitled to 1/3 share of the money, she can only withdraw any amount which the plaintiff allows or is presumed to have allowed. An excessive withdrawal entitles the plaintiff to withdraw the arrangement. As the plaintiff had not donated 1/3 share of the money to the 1st defendant or the 2nd defendant, both the defendants fail in their counter-claim, and I therefore dismiss their counter-claim with cost.

I have concluded that it was the plaintiff and not the 1st defendant who bought the tickets. I have held that the price money belongs to the plaintiff and the defendants are holding the money in trust for the plaintiff. Finally I have also held that the plaintiff did not make any gift of the price money to the defendants. However I cannot fail to notice or ignore the established facts that the plaintiff's only known source of income is from the petrol station and the mini market and that the collections from both business are credited into the bank account of Kim and company operated by the plaintiff alone, that the 1st defendant assists and even contributes substantial amount of money to the business. They even agree to operate the fixed deposit account and the savings account jointly and share equally the amounts withdrawn from the savings account until the 1st defendant discovered that the plaintiff was spending his money on the 2nd wife and buying cars for her children. It is my finding that the lottery tickets were purchased by the plaintiff from the funds of Kim and company to which the 1st defendant contributed her time and energy, financially and other domestic activities alongside the plaintiff's contribution. It follows that the price money should be shared equally between the plaintiff and the 1st defendant.

In the matter of *Rebecca Mariam Zyk* [1995] FUC 92-644 in the full court of the Family Court of Australia, Baker J is quoted as saying in *Anastasio* [1987] FLC 91-93 as follows: "I am of the view that the win in the lottery should be regarded in the same light as any other asset acquired by parties during a marriage and be distributed between them in the same proportion and in the same manner as other assets. Marriage is for most partners an economic union ... Although the lottery ticket was purchased by the husband, it was so purchased with the object and hope of achieving a matrimonial objective and I propose therefore to regard same as a matrimonial asset." In the above case

their Lordships said: "In the ordinary run of marriage a ticket is purchased by one or other of the parties from money which he or she happens to have at that particular time. That fact should not determine the issue where both parties are in receipt of income where their marriage is predicated upon the basis of each contributing their income towards the joint partnership constituted by their marriage, the purchase of the ticket would be regarded as a purchase from joint funds in the same way as any other purchase within that context and would be treated accordingly. See *Anastasio* where one party is working and the other is not, the same conclusion would ordinarily apply because that is the mode of partnership selected by the parties. The income of the working member is treated as joint in the same way as the domestic activities of the non-working partner are regarded as being for their joint benefit. In the sort of cases to which we have referred above the conclusion would be that the ticket was purchased by joint funds and the contribution of the prize would be seen as a contribution by the parties equally."

Similarly in *Zyk and Zyk* [1995] FLC 29-644 the full court held that in most cases lottery wins achieved in the course of a marriage or a period of cohabitation are to be regarded in the course of a marriage as joint contribution by the parties rather than a contribution by that party who actually purchased the ticket.

Under the circumstances and taking into consideration the opinions expressed in those judgements I allow the plaintiff's claim and make an order that the price money remaining both in the fixed deposit account and the savings account be shared equally between the plaintiff and the 1st defendant.

For the purpose of the record I would like to add that pending the outcome of this litigation I have allowed the plaintiff and the 1st defendant at my behest and good conscience of both counsels to withdraw a certain amount of money from the savings account and to share that money equally to enable the plaintiff to use his portion to visit his relatives in China. Much later I have also allowed on request a certain amount to be drawn and shared equally to enable the plaintiff to seek medical examination and treatment. After this judgment the 1st defendant refused to facilitate the withdrawal of the price money on terms ordered by the court. She had to be compelled by an order of this court. I say this because the windfall of RM2 million still intact in the fixed deposit account and accumulated interest in the savings account does not seem to bring joy, happiness and contentment to this old couple since that time, at present and until the end of time. Poor is she/he who is rich when enough is never enough.